

E-FILED on 3/10/10IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

12 JENNY WOLFES,	No. C-07-00696 RMW
13 Plaintiff,	
14 v.	ORDER GRANTING DEFENDANT'S
15 BURLINGTON INSURANCE COMPANY, et al.	MOTION FOR SUMMARY JUDGMENT
16 Defendants.	AND MOTION FOR PARTIAL SUMMARY
	JUDGMENT
	[Re Docket No. 49]

19 JENNY WOLFES,	No. C-07-04657 RMW
20 Plaintiff,	
21 v.	
22 BURLINGTON INSURANCE COMPANY, et al.	
23 Defendants.	

26 Plaintiff Jenny Wolfes ("Wolfes") was sued by her former employer, Big Sky Entertainment  
27 III, Inc. ("Big Sky") in Santa Clara County Superior Court. *Big Sky Entertainment III et al. v. Jenny*  
28 *Wolfes*, Sup. Ct. Case No. 104CV025291 ("the Big Sky Action"). Wolfes subsequently sued

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND GRANTING MOTION FOR PARTIAL SUMMARY  
JUDGMENT—Nos. C-07-00696 RMW and C-07-04657 RMW

1 defendant Burlington Insurance Company ("Burlington") in California state court seeking  
2 declaratory relief that Burlington has a duty to defend or indemnify her in the Big Sky Action under  
3 an insurance policy issued to Big Sky. Burlington successfully removed the case to this court as  
4 Case No. 07-00696. *Wolfes v. Burlington Ins. Co.*, Case No. 07-00696. Wolfes then filed a second  
5 action against Burlington in federal court, Case No. 07-04657, asserting causes of action for breach  
6 of contract, breach of the covenant of good faith and fair dealing, and intentional and negligent  
7 infliction of emotional distress, and seeking, *inter alia*, punitive damages. *Wolfes v. Burlington Ins.*  
8 *Co.*, Case No. 07-04657. Wolfes premised these claims on Burlington's breach of its duty to defend.

9 Burlington now moves for summary judgment as to its duty to defend Wolfes in the Big Sky  
10 Action and, in the alternative, for partial summary judgment as to the claims against it for breach of  
11 the implied covenant of good faith and fair dealing ("bad faith") and intentional infliction of  
12 emotional distress. For the reasons set forth below the court: (1) grants Burlington's motion for  
13 summary judgment that it did not have a duty to defend Wolfes and (2) grants Burlington's  
14 alternative motion for partial summary judgment as to the claims of bad faith and intentional  
15 infliction of emotional distress.

## 16 I. BACKGROUND

17 Wolfes is involved in three cases involving the same underlying facts. The first is the Big  
18 Sky Action, in which she is the defendant and a counter-claimant. As set forth above, the second,  
19 Case No. 07-00696, was originally filed in state court but on February 2, 2007 Burlington removed  
20 it to this court on the basis of diversity. Wolfes filed the third action, Case No. 07-04657, in federal  
21 court approximately 7 months later on September 10, 2007. The two federal cases were related on  
22 January 7, 2008 and consolidated on May 7, 2008.

### 23 A. The Big Sky Action

24 In 2004, Big Sky operated a night club, the Blue Tattoo, in San Jose. From June 2004 to July  
25 2004, Wolfes was vice president, secretary, officer and director of Big Sky as well as the night club's  
26 manager. In spring 2004, Big Sky was in financial difficulty and seeking to sell its assets to a third  
27 party. Wolfes objected to the sale, suggesting that the assets should be sold on the open market, and  
28 allegedly vowed to do everything in her power to stop the sale. According to the complaint in the

1 Big Sky Action, Wolfes solicited employees and promoters of the club to stop working with Big  
2 Sky, engaged in unauthorized contact with the San Jose Planning Commission and other agencies,  
3 made accusations about the building site and made phone calls that were allegedly designed to  
4 discourage the third party purchasers from buying the club's assets. On or about July 21, 2004, the  
5 buyers gave notice that they wanted to back out of the transaction.

6 On August 17, 2006, Big Sky and its directors filed a verified complaint against Wolfes  
7 seeking injunctive relief enjoining Wolfes from contacting the buyers of the company assets or  
8 taking action to affect the company without first consulting with and obtaining approval from Big  
9 Sky's directors and alleging causes of action for conversion, breach of fiduciary duty and  
10 interference with prospective economic relations under state law. Wolfes cross-complained against  
11 plaintiffs in the Big Sky Action for defamation.

12 **B. The Federal Actions**

13 Big Sky was insured by two Commercial General Liability (CGL) insurance policies: (1) an  
14 insurance policy from Crusader Insurance Company, number SRL-004903, which insured officers,  
15 directors and employees from June 27, 2003 to June 27, 2004 (not at issue in this case); and (2) an  
16 insurance policy from defendant Burlington, number 585BW03318 ("the Policy"), from June 27,  
17 2004 to September 27, 2004. Decl. of Aaron C. Agness ("Agness Decl."), Ex. 1. Wolfes tendered  
18 her defense of the Big Sky Action to Burlington, but Burlington declined to defend her.<sup>1</sup> Wolfes  
19 subsequently filed suit against Burlington.

20 As discussed above, Wolfes brought two federal actions against Burlington. The first action,  
21 Case No. 06-00696, asserts a single claim for declaratory relief that, under the terms of the policy,  
22 Burlington is obligated to provide Wolfes a defense in the Big Sky Action. The second action, Case  
23 No. 07-04657, subsequently filed by Wolfes against Burlington in federal court, asserts claims for  
24 bad faith and for intentional infliction of emotional distress suffered in conjunction with Burlington's  
25 failure to provide a defense to Wolfes.

26  
27 <sup>1</sup> William Leunis, a plaintiff and counterdefendant in the Big Sky Action tendered his defense of  
28 Wolfes' counterclaim for defamation to Burlington, which defense Burlington agreed to provide.  
Also, plaintiff tendered her defense of the Big Sky Action to Crusader, which (unlike Burlington)  
agreed to provide a defense under the policy.

1           **C. The Burlington Policy**

2           Section II of Burlington's CGL insurance policy defines who is an insured under the policy.  
3 In relevant part, it states: "If you are designated in the Declarations as . . . [a]n organization other  
4 than a partnership, joint venture, or limited liability policy, you are an insured. Your 'executive  
5 officers' and directors are also insured, but only with respect to their duties as your officers or  
6 directors." Agness Decl., Ex. A, § II ¶ 1.d (Docket No. 49-3 at 35 of 86). Section I sets forth the  
7 scope of coverage, providing as follows: "We will pay those sums that the insured becomes legally  
8 obligated to pay as damages because of 'personal and advertising injury' to which this insurance  
9 applies. We will have the right and duty to defend the insured against any 'suit' seeking those  
10 damages. However, we will have no duty to defend the insured against any 'suit' seeking damages  
11 for 'personal and advertising injury' to which this insurance does not apply." *Id.* at § I ¶ 1.a (Docket  
12 No. 49-3 at 33 of 86).

13           The insurance policy defines "personal advertising injury" as follows: "'Personal and  
14 advertising injury' means injury, including consequential 'bodily injury', arising out of one or more  
15 of the following offenses: . . . d. Oral or written publication of material that slanders or libels a  
16 person or organization or disparages a person's or organization's goods, products, or services." *Id.* §  
17 V ¶ 14.d (Docket No. 49-3 at 40 of 86).

18           **D. Tender of Defense**

19           On October 20, 2005, Wolfes tendered her defense to Burlington. Declaration of David  
20 Kraft, Ex. D. On November 1, 2005, a claims manager at Burlington, Frank Evans, acknowledged  
21 receipt of the letter tendering Wolfes' defense, but disclaimed coverage and declined to provide a  
22 defense. *Id.*, Ex. E. On July 17, 2006, Wolfes requested that Burlington reconsider its decision. *Id.*,  
23 Ex. F. On September 11, 2006, Burlington reaffirmed its decision to decline provision of a defense.  
24 *Id.*, Ex. G.

25           Burlington declined coverage for two reasons. First, it asserted that there was no potential  
26 for coverage of the claims asserted against Wolfes in the Big Sky Action. Specifically, Burlington  
27 asserted that there was no potential for coverage under the policy because (1) the Big Sky Action  
28 "does not contain a cause of action for slander or libel"; and (2) the complaint "does not contain any

1 allegations of unprivileged communications by Ms. Wolfes which slanders or libels an organization  
2 or the organization's goods, products, or services." *Id.*, Ex. G at 5-6, 7. Second, Burlington found  
3 that Wolfes was not an insured under the policy at the time of the acts alleged by Big Sky. *Id.*, Ex.  
4 G at 4.

5 **E. May 7, 2008 Order**

6 On May 7, 2008, this court issued an order (1) denying Burlington's motion to dismiss case  
7 No. 07-04657 and consolidating it with Case No. 07-00696; (2) granting Burlington's motion to  
8 strike Wolfes' prayer for punitive damages; and (3) denying Wolfes' motion for summary judgment  
9 that Burlington had a duty to defend her. In denying Wolfes' motion for summary judgment, this  
10 court found, based on the evidence presented, that there was no evidence suggesting that Wolfes was  
11 acting in her role as director of Big Sky when she made the statements which form the basis of the  
12 Big Sky Action and thus was not an insured. This holding required the court to deny Wolfes' motion  
13 for summary judgment. No counter-motion was made by Burlington at the time.

14 **II. ANALYSIS**

15 **A. Motion for Summary Judgment**

16 Burlington now moves for summary judgment on the basis that, as a matter of law, its CGL  
17 insurance policy does not require it to provide Wolfes with a defense in the Big Sky Action.  
18 Burlington attacks Wolfes' theory that Wolfes was acting as a director of the company when she  
19 engaged in the actions at issue in the Big Sky Action. In the alternative, Burlington contends that  
20 neither the allegations in paragraph 18 nor 21, nor elsewhere in the complaint, trigger its duty to  
21 defend.<sup>2</sup>

22 **1. Duty to Defend**

23 The California Supreme Court has held that "a liability insurer owes a broad duty to defend  
24 its insured against claims that create a potential for indemnity." *Horace Mann Ins. Co. v. Barbara*  
25 *B.*, 4 Cal. 4th 1076, 1081 (1993) (citing *Gray v. Zurich Insurance Co.*, 65 Cal. 2d 263 (1966)).  
26

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27 <sup>2</sup> Burlington's moving papers additionally state that it has no duty to defend Wolfes against Leunis'  
28 underlying cross-complaint. However, because Wolfes has not raised such a claim, the court does  
not address it.

1 "Implicit in this rule is the principle that the duty to defend is broader than the duty to indemnify; an  
2 insurer may owe a duty to defend its insured in an action in which no damages ultimately are  
3 awarded." *Montrose Chemical Corp. v. Superior Court*, 6 Cal. 4th 287, 295 (1993) (citing *Horace  
4 Mann, supra*, 4 Cal. 4th at 1081).

5 However "an insurer has a duty to defend only if it becomes aware of, or if the third party  
6 lawsuit pleads, facts giving rise to the potential for coverage under the insurance policy." *Lomes v.  
7 Hartford Fin. Svcs. Group, Inc.*, 88 Cal. App. 4th 127, 132 (2001), (citing *Montrose*, 6 Cal. 4th at  
8 295; *Horace Mann*, 4 Cal. 4th at 1081). "[T]he insured need only show that the underlying claim  
9 may fall within the policy coverage; the insurer must prove it *cannot*." *Montrose*, 6 Cal. 4th at 300.  
10 However where there is no potential for coverage the insurance company has no duty to defend.  
11 *Lomes*, 88 Cal. App. 4th at 132 (citing *La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity  
12 Co.*, 9 Cal. 4th 27, 40 (1994)).

13 "Whether an insurance policy provides [the] potential for coverage and, thus, a duty to  
14 defend exists, is a question of law for the court to decide." *Lomes*, 88 Cal. App. 4th at 132 (citing  
15 *Waller v. Truck Ins. Exchange, Inc.*, 11 Cal. 4th 1, 18 (1995)). Such a determination is typically  
16 made by comparing the allegations of the complaint to the policy terms. *Lomes*, 88 Cal. App. 4th at  
17 132 (citing *Zelda, Inc. v. Northland Ins. Co.*, 56 Cal. App. 4th 1252, 1259 (1997)). Paragraph 18  
18 and paragraph 21 of the complaint, respectively, allege the following:

19 18. On or about July 21, 2004, plaintiffs heard from reliable sources that Wolfes had  
20 made telephone calls to interfere with the sales transaction. That evening, the buyers  
gave notice that they wanted to back out of the purchase of assets, and the company had  
to make significant concessions to the buyers to keep them interested.  
21

22 21. Notwithstanding the decisions of the directors and shareholders to sell company  
assets, Wolfes has continued to take actions which are disruptive of that sale. Plaintiffs  
have spoken with employees of the company and with promoters who state that  
defendant Wolfes has solicited them to stop working at the company. Defendant Wolfes  
has made accusations about building at the property without knowing all the facts and  
without discussing the facts at directors' meeting. She has made unauthorized contact  
with the San Jose Planning Commission, and other state and local agencies, for the  
apparent purpose of interfering with the planned sale of assets to the buyers. She has  
made demands to inspect corporate records at times when she knew the director and  
Chief Financial Officer of the company was out of the area and when the company could  
not possibly comply. Defendant's actions are not beneficial to the company and are in  
breach of her fiduciary duties to the company, its shareholders and creditors.  
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1 Request for Judicial Notice in Support of The Burlington Insurance Company's Motion for Summary  
 2 Judgment or in the Alternative, for Partial Summary Judgment, Ex. D, ¶¶ 18, 21.<sup>3</sup>

3 The policy providea that Wolfes would be entitled to coverage if allegations were made with  
 4 "respect to [her] duties as [Big Sky's officer or director]" and if the allegations involved claims  
 5 related to personal and advertising injury, including but not limited to "[o]ral or written publication  
 6 of material that slanders or libels a person or organization or disparages a person's or organization's  
 7 goods, products or services." Agness Decl., Ex. A, § II ¶ 1.d; § V ¶ 14.d. However, the policy  
 8 specifically provides that the insurer has no duty to defend "against any 'suit' seeking damages for  
 9 'personal and advertising injury' to which this insurance does not apply." *Id.* at § I ¶ 1.a.

10 Based on the foregoing, this court must decide whether, as a matter of law, Burlington did  
 11 not owe a duty to defend Wolfes.

12 **2. Duties as Director or Officer**

13 In order to trigger Burlington's duty to defend, Wolfes first must show that the allegations in  
 14 the Big Sky Action pertained to her actions with respect to her duties as an officer or director.  
 15 California Corporation Code § 300(a) states, in pertinent part:

16 [T]he business and affairs of the corporation shall be managed and all corporate  
 17 powers shall be exercised by or under the direction of the board. The board may  
 18 delegate the management of the day-to-day operation of the business of the  
 19 corporation to a management company or other person provided that the business and  
 20 affairs of the corporation shall be managed and all corporate powers shall be exercised  
 21 under the ultimate direction of the board.

22 This principle was reiterated in *Lomes*, 88 Cal. App. 4th at 134, in which the appellate court  
 23 held that "[a]n individual director has no authority to take action on behalf of the corporation without  
 24 the consent of the board of directors." In the instant action, Burlington argues that Wolfes could not  
 25 have been acting as a director when she attempted to interfere with the sale of Big Sky's assets

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26 <sup>3</sup> Defendant submitted a request for the court to take judicial notice of the following: (1) Wolfes'  
 27 complaint against Burlington in Case No. 07-00696; (2) Wolfes' complaint against Burlington in  
 28 Case No. 07-04657; (3) this court's order dated May 7, 2008; (4) Big Sky's complaint against Wolfes  
 in the Big Sky Action; and (5) Leunis' first amended cross-complaint against Wolfes. Although  
 judicial notice is not necessary with respect to the pleadings in the present case, the court will take  
 judicial notice of Big Sky's complaint.

1 because her actions were in contravention of the board of director's majority decision to sell the  
2 assets.

3 In *Lomes*, 88 Cal. App. 4th, the court found that a similar situation failed to trigger an  
4 insurer's duty to defend. In that case, the defendant, a director and majority shareholder of Newton  
5 Wholesale, filed a counterclaim against the plaintiff, a director and minority shareholder of Newton  
6 Wholesale, in federal court for, *inter alia*, defamation. *Id.* at 129-130. When plaintiff sued Hartford  
7 Insurance Company, seeking representation, Hartford refused to represent him because, in accordance  
8 with the policy provisions, he was not "carrying out his duties as a director when he allegedly  
9 slandered [defendant]." *Id.* at 130. In an appeal from a partial summary judgment for plaintiff, the  
10 court of appeal reversed and found that plaintiff "cannot reasonably be said to have been acting in his  
11 capacity as a Newton Wholesale director when he allegedly defamed the corporation and his former  
12 partner. Such statements could hardly be considered helpful in attracting lenders to Newton." *Id.* at  
13 133.

14 However, Wolfes contends that if the allegations in the Big Sky Action do not pertain to her  
15 duties as a director, they pertain to her duties as an officer of the corporation. Wolfes asserts that her  
16 actions were performed with the best interests of the company in mind. Wolfes recounts the  
17 following facts pertaining to an alleged double-ending transaction that she attempted to thwart: In or  
18 about July 2004, one of the Big Sky directors, Edward Pope ("Pope"), proposed to sell Big Sky to  
19 Bobby Tran and Khoa Nguyen, collectively doing business as Gruv Industries. Plaintiff Jenny  
20 Wolfes' Opposition to the Burlington Insurance Company's Motion for Partial Summary Judgment, 9.  
21 Pope informed the Board of Directors that Gruv Industries would pay \$225,000 for the assets of Big  
22 Sky. *Id.* However, Wolfes believed that Pope was secretly profiting from the transaction, as she  
23 knew that the price quoted by Pope was far below the value of the assets of Big Sky. *Id.* In order to  
24 prove her assumptions, Wolfes "performed acts and made statements calculated to delay and/or stop  
25 the transaction and prove that Pope was 'double-ending' the transaction." *Id.* at 9-10. Wolfes asserts  
26 that "[t]hese actions were in the best interests of Big Sky and within [her] responsibility as 'managing  
27 partner' of Big Sky." *Id.* at 10.

28

1       Whether Wolfes' motives were justified or whether Big Sky was being misled in connection  
2 with the sale of its business is not the issue. Burlington covered Wolfes as an insured only with  
3 respect to her duties as a Big Sky officer or director. The allegations in the complaint against Wolfe  
4 expressly say that "[n]otwithstanding the decisions of the directors and shareholders to sell company  
5 assets Wolfe has continued to take actions which are disruptive of that sale. Wolfes cannot have been  
6 performing her duties as an officer or director when she was trying to prevent that which the directors  
7 and shareholders of Big Sky had decided to do. It is important to note that Wolfes was not sued by  
8 Big Sky for advising against the sale which the board later appproved. She was sued for trying to  
9 disrupt the action Big Sky had voted to take.

10       Wolfes points to *Barnett v. Firemans Fund Ins. Co.*, 90 Cal. App. 4th 500 (2001), as  
11 supporting her coverage position. In *Barnett*, appellants, executive officers of MedPartners, a large  
12 physician practice management company, expressed concern to MedPartners and others that the  
13 management and organizational structure of the company violated California's prohibition against the  
14 corporate practice of medicine. *Id.* at 505. Appellants' employment was terminated and MedPartners  
15 filed suit, alleging that appellants had made representations that disparaged and damaged the  
16 company. *Id.* at 506. Appellants asked Fireman's Fund Insurance Company ("Fireman's") to defend  
17 them and, when Fireman's declined, they brought suit alleging breach of contract. *Id.*

18       On appeal, the court decided that "[b]ecause the complaint alleges [appellants] were seeking  
19 to further corporate interests when they criticized MedPartners, it is possible they were engaged with  
20 respect to their duties as executive officers when they committed the alleged misconduct and  
21 therefore a potential for coverage exists." *Id.* at 513. *Barnett* distinguished *Lomes*: "*Lomes*'s analysis  
22 revolved around the absence of any evidence that the plaintiff was discharging his corporate duties  
23 when he defamed the entity. Here, however, [the court] must assume the truth of [appellants']  
24 allegations that they were acting as officers seeking to further the interests of the corporation." *Id.* at  
25 513, n.8.

26       In the present case, Wolfes was interfering with a decision the shareholders and directors of  
27 Big Sky had made. The court does not see how Wolfes can be said to have been acting in the  
28 capacity of an officer or director for the named insured, Big Sky Entertainment III, Inc., when the

1 acts for which she was being sued by Big Sky consisted of trying to get third parties to undermine the  
2 sale of business assets which the shareholders and directors of the corporation had voted to sell. The  
3 situation is quite different from that in *Barnett* where former officers of MedPartners were held  
4 entitled to a defense to a defamation claim brought against them by their former employer  
5 MedPartners. Before the former officers had their employment terminated and while purportedly  
6 acting in the capacity of officers, they made statements expressing concern that changes implemented  
7 by MedPartners would violate California's prohibition against the corporate practice of medicine.  
8 The court held that these former officers were entitled to a defense because they could have been  
9 acting as officers to advance the interests of MedPartners when they expressed concerns about  
10 MedPartners' corporate practice of medicine. Insuring that one's company complies with the law  
11 regarding the practice of medicine is within the scope of the duties of an officer or director. The  
12 former officers may have been so acting at the time they allegedly defamed MedPartners.

13 In contrast to the situation in *Barnett*, and based on the evidence presented, this court  
14 concludes that, as a matter of law, Wolfes was not acting within the scope of her duties as an officer  
15 or director when she allegedly committed the wrongful actions alleged by Big Sky. Therefore, she  
16 was not an insured under Big Sky's policy and was not entitled to a defense of the claims brought  
17 against her by Big Sky.

### 18           **3.       Allegations of Slander and/or Disparagement**

19           Although Wolfes' has been determined not to qualify as an insured at the time of the wrongful  
20 acts alleged in Big Sky's complaint, the court will nevertheless discuss whether the allegations  
21 involve claims related to personal and advertising injury.

22           Slander is defined as "false and unprivileged publication, orally uttered, . . . which . . . [t]ends  
23 directly to injure [any person] . . . by imputing something with reference to his office, profession,  
24 trade, or business that has a natural tendency to lessen its profits; . . . or . . . [w]hich by natural  
25 consequence, causes actual damage." Cal. Civ. Code § 46.

26           Wolfes argues that there is a genuine issue of material fact as to whether the Big Sky Action  
27 included a cause of action for slander. She states that a reasonable interpretation of paragraph 18 of  
28 the complaint is that Wolfes allegedly made *false* statements to third parties that tended to injure the

1 reputation of the plaintiffs and that a reasonable interpretation of paragraph 21 is that Wolfes  
2 allegedly made *false* accusations about the property that tended to injure the reputation of plaintiffs,  
3 and thus interfere with the sale. (Emphasis added). She argues that such an interpretation triggers  
4 Burlington's duty to defend.

5 Disparagement is the publication of false and injurious statements that are derogatory of  
6 another's goods or services. *See Total Call Intern., Inc. v. Peerless Ins. Co.*, 181 Cal.App. 4th 161,  
7 169 (2010). Wolfes argues that there is a genuine issue of material fact as to whether the Big Sky  
8 Action included a cause of action for disparagement. She states that paragraph 18 raises the  
9 possibility of a disparagement claim because Big Sky's need to make concessions to the purported  
10 buyers could only be the result of Wolfes' alleged statements interfering with the sales transaction.  
11 Likewise, Wolfes argues that paragraph 21 raises the possibility of a disparagement claim because a  
12 reasonable interpretation of that portion of the complaint is that Wolfes made statements, either to  
13 buyers or to third parties, that tended to interfere with the sale, while still recognizing that the alleged  
14 statements could only interfere with the sale if they called into question the value and/or propriety of  
15 the sale. Again, she argues that such an interpretation triggers Burlington's duty to defend.

16 Contrary to Wolfes' assertions, neither paragraph 18 nor paragraph 21 charge Wolfes with  
17 slander or disparagement and Wolfes cannot speculate as much in order to create coverage. *See*  
18 *Gunderson v. Fire Ins. Exchange*, 37 Cal. App. 4th 1106, 1114 (1995) ("An insured may not trigger  
19 the duty to defend by speculating about extraneous 'facts' regarding potential liability . . .").  
20 Moreover, while liability insurers must defend a suit which alleges claims potentially within the  
21 scope of policy coverage, and while facts extrinsic to the allegations of the complaint trigger a duty to  
22 defend when they reveal a possibility that the policy may cover the claim, such extrinsic facts must be  
23 known by the insurer at the inception of the lawsuit. *Id.* at 1113-14.

24 A "false statement" is a key element in a claim of slander or disparagement. *See* Cal. Civ.  
25 Code § 46; Merriam-Webster's Dictionary of Law, 1996. Nowhere in the underlying complaint does  
26 Big Sky assert that Wolfes made any false statements. "For there to be coverage, the [underlying  
27 complaint] must have alleged every necessary element of [slander or disparagement]." *Lindsey v.*  
28 *Admiral Ins. Co.*, 804 F. Supp. 47, 52 (N.D. Cal. 1992) (applying California law). While it is

1 possible that the existence of factual allegations anywhere in a complaint can give rise to potential  
2 liability for slander or disparagement, *see Dobrin v. Allstate Ins. Co.*, 897 F. Supp. 442, 444 (C.D.  
3 Cal. 1995) (applying California law), no such factual allegations are alleged in the underlying  
4 complaint.

5 Because Wolfes fails to present any genuine issue of material fact as to whether the  
6 underlying complaint asserts a claims for slander or disparagement, the court concludes that, as a  
7 matter of law, Burlington does not owe Wolfes a duty of defense under the terms of the insurance  
8 policy.

9           **B. Defendant's Alternative Motion for Partial Summary Judgment**

10           Burlington also asks that the court dismiss Wolfes' claims against it for bad faith and  
11 intentional infliction of emotional distress.

12           **1. Bad Faith**

13           A claim for bad faith requires a tortious breach of the covenant of good faith and fair dealing  
14 that is implied by law in every contract. Breach of this covenant involves something beyond the  
15 breach of the specific contractual duties or mistaken judgment. *Congleton v. Natl. Union Fire Ins.*  
16 *Co.*, 189 Cal. 3d 51, 59 (1987). Before it can be determined that an insurance company acted in bad  
17 faith in refusing to defend the insured, it must be shown that the refusal was without proper cause.  
18 "[D]eclining to perform a contractual duty under the policy *with proper cause* is not a breach of the  
19 implied covenant." *California Shoppers, Inc. v. Royal Globe Ins. Co.*, 175 Cal. 3d 1, 54 (1985).

20           Because this court has determined that Burlington had no duty to defend Wolfes in the  
21 underlying lawsuit, it follows that Burlington could not have breached the duty it owed her under the  
22 CGL insurance policy. "It is clear that if there is no . . . [coverage under the policy], there can be no  
23 action for breach of the implied covenant of good faith and fair dealing because the covenant is based  
24 on the contractual relationship between the insured and the insurer." *Waller v. Truck Ins. Exch., Inc.*,  
25 11 Cal. 4th 1, 36 (1995).

26           Based on the foregoing, this court will grant Burlington's motion for summary judgment that,  
27 as a matter of law, Wolfes failed to state a claim for bad faith.

28           **2. Intentional Infliction of Emotional Distress**

In order for Wolfes to prove a claim for intentional infliction of emotional distress she must plead and prove acts by Burlington, directed at her, which are "so extreme as to exceed all bounds of that usually tolerated in a civilized community." *Schlauch v. Hartford Acc. & Indem. Co.*, 146 Cal. App. 3d 926, 936 (1983).

5 This court has determined that Burlington has not breached its duty of defense. Because  
6 Burlington did not have any obligation to provide coverage under the policy, its actions in denying  
7 coverage cannot have risen to the level of those that result in an intentional infliction of emotional  
8 distress. As such, this court will grant Burlington's motion for summary judgment that, as a matter of  
9 law, Wolfes failed to state such a claim.

### III. ORDER

11 For the foregoing reasons, the court grants Burlington's motion for summary judgment that it  
12 has no duty to defend. The court also grants Burlington's alternative motion for partial summary  
13 judgment as to Wolfes' claims for bad faith and intentional infliction of emotional distress.

15 DATED: 3/10/10

**RONALD M. WHYTE**  
United States District Judge

**RONALD M. WHYTE**  
United States District Judge

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